No. 14,567

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN GISKE,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, HALFERTY CANNERIES, INC., and D. K. MACDONALD & CO.,

Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLANT.

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OPINION BELOW.

The District Court did not render an opinion in this case.

JURISDICTION.

This is an appeal from an award of the Alaska Industrial Board brought to the District Court under the provisions of §43-3-22 ACLA 1949. (R. 6.) On July 29, 1954, the District Court, without opinion,

entered its decree affirming the award of the Board. (R. 11-12.) An appeal from such decree was taken on August 12, 1954, by filing with the District Court notice of appeal. (R. 13.) The jurisdiction of the District Court rests on the Act of June 6, 1900, 31 Stat. 322, as amended, 48 USCA §101; the jurisdiction of this Court on §1291 of the Federal Judicial Code.

STATEMENT.

Appellant adopts as his statement of the case, the Agreed Statement set out in the Record at pages 3-6.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set out in the Appendix, infra.

QUESTIONS PRESENTED.

1. Whether the Alaska Industrial Board, in determining appellant's average daily wage earning capacity, made findings of fact in compliance with the provisions of §43-3-16 ACLA 1949.

2. Whether the facts in this case justify the determination by the Alaska Industrial Board and by the District Court that during the period of appellant's disability his average daily wage earning capacity, within the meaning of the "Temporary Dis-

ability'' section of §43-3-1 ACLA 1949 was $3.88 per day.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In not making sufficient findings of fact, in compliance with the provisions of §43-3-16 ACLA 1949, to support its determination that appellant's average daily wage earning capacity during the period of his disability was $3.88 per day.

2. In holding that there was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining that plaintiff's average daily wage during the period of his disability was $3.88 per day.

3. In entering its decree in favor of the appellees and in affirming the decision and award of January 8, 1954, of the Alaska Industrial Board, and in giving judgment to appellees against appellant for the former's costs and attorney's fees.

ARGUMENT.

PRELIMINARY CONSIDERATIONS.

These facts are not in dispute: That appellant was injured by accident in the course of his employment with appellee, Halferty Canneries, Inc., on September 3, 1952, and left such employment on September 27,

1952 (R. 3); that at the time of such injury his average daily wage was $17.63 (R. 3); that by reason of such injury appellant suffered a "temporary disability" within the meaning of the "temporary disability" provision of §43-3-1 ACLA 1949, for the period September 27, 1952 to December 31, 1952 (R. 6, 9); and that he was entitled to temporary disability compensation for that period by virtue of such provision of the statute. What is in dispute is the amount of compensation to which appellant was entitled by reason of such injury, and the answer to this depends upon the proper construction, and application in this case, of that part of the statute above mentioned. This section of temporary disability reads as follows:

> "[Temporary disability.] For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.
>
> "Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

> "The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition."

Prior to the Alaska Industrial Board's award of January 8, 1954, appellees had paid appellant temporary disability compensation at the rate of 65% of $2.12, or, $1.39 per day. This constituted appellees' determination of appellant's "average daily wage earning capacity", and presumably, this was based upon the average of appellant's earnings for past years outside of the Territory of Alaska at the end of the Territorial fishing seasons. (R. 9-10.)

When this matter was referred to and heard by the Board Chairman, pursuant to the provisions of §43-3-15 ACLA 1949, an award for temporary disability compensation was made based upon an average wage earning capacity of $7.05 per day (R. 5); and upon application for review by the full Board, under the provisions of §43-3-16 ACLA 1949, this decision of the Chairman was set aside, and a determination was made that appellant's average earnings capacity

during the period of his disability was $3.88 per day (R. 6), and this determination was affirmed by the District Court (R. 11-12). Hence, in summary: appellees' determination of appellant's average daily wage earning capacity during the period of his disability was $2.12; that of the Industrial Board Chairman, $7.05; and that of the full Board and the District Court, $3.88.

It is appellant's position that none of these figures are correct; that his average earning capacity should have been computed on the basis of his earnings with appellee, Halferty Canneries, Inc., at the time of his injury.

I. IT WAS REVERSIBLE ERROR TO HAVE NOT MADE FINDINGS OF FACT IN COMPLIANCE WITH THE PROVISIONS OF §43-3-16 ACLA 1949.

Although the Board did not say so, it presumably can be implied from its finding that appellant's wage earning capacity was $3.88 per day (R. 8), the initial determination that appellant's actual earnings, at the time of his injury, did not "fairly and reasonably represent his daily wage earning capacity". §43-3-1 "Temporary Disability". This being the case, it was then the duty of the Board to fix such earning capacity after having "due regard" to each of the following:

1. The nature of the injury.
2. The degree of temporary impairment.
3. Appellant's usual employment.

4. Any other factor or circumstance in the case which may have affected his capacity to earn wages in his temporarily disabled condition.

It is impossible to tell from the record in this case, because of the simple conclusion that appellant's earning capacity was $3.88 per day (R. 8), what the above factors had to do with this determination of earning capacity. In fact, the Board's findings were so lacking in particularity, that it is safe to assume that no regard at all was had to those items specified in the statute.

What, then, the Board has done is to make an award of $3.88 per day for a certain period, but it has failed to accompany this with the "findings of fact upon which it is based * * *", §43-3-16 ACLA 1949. Such findings, it would seem, should be obligatory. If the law were otherwise, there would be nothing to prevent a Board, in respect to temporary compensation awards, from making an arbitrary choice of some figure supposedly representing one's average wage earning capacity—a figure which would bear no logical relation to the injured person's actual earning capacity during the period of his disability, his "usual earnings", the nature of his injury, or the degree of temporary impairment—and base an award on that figure. The whole purpose and intent of the Workmen's Compensation Law—to fairly compensate one for loss of earnings during the period of his disability—would thus be frustrated, and sanction of the Board's action in this respect would be given by the Courts if the latter would hold, upon review of the

Board's decision on any such case, that it thus sufficiently complied with the provisions of law requiring findings of fact upon which an award is based.

That is precisely the case here. There is no conceivable way to determine from the Board's decision and award of January 8, 1954, what relation, if any, the figure of $3.88 per day bears to appellant's usual earnings, the nature of his injury, or the degree of his temporary impairment. The failure of the Board, and the District Court, to indicate in any degree the basis for the award made and the determination that appellant's earning capacity was $3.88 per day, constitutes a failure to comply with the provisions of §43-3-16 ACLA 1949, and has made it impossible for this reviewing Court to determine whether there was any substantial evidence in the Record which would support this determination. This, it is submitted, was error, and sufficient reason for reversing the decision of the District Court. See *DeVore v. Maidt Plastering Co.,* 205 Okla. 610, 239 P. 2d 520; *Fireman's Fund Ins. Co. v. Peterson,* CA-9, 120 F. 2d 547, 548; *Howard v. Monahan,* 33 F. 2d 220.

II. THE EVIDENCE DOES NOT SUPPORT THE BOARD'S DETERMINATION, AFFIRMED BY THE DISTRICT COURT, OF APPELLANT'S AVERAGE DAILY WAGE EARNING CAPACITY.

Even if it could be held that the Board's decision that appellant's daily average wage earning capacity was $3.88 was a "finding" in sufficient compliance with §43-3-16 ACLA 1949 (which appellant does not

admit), still, there is no substantial evidence in the Record to support this determination. Rather, the evidence clearly supports the fact that appellant's earning capacity was considerably more than the amount determined by the Board and the District Court.

The Alaska statute on this subject, §43-3-1 "Temporary Disability", measures one's earning capacity under two situations: (1) by his actual earnings at the time of injury, ". . . if such actual earnings fairly and reasonably represent his daily wage earning capacity", and (2) if such earnings do not fairly represent such capacity, then by what does constitute "reasonable" wage earning capacity, "having due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition."

The law, however, is silent on the subject of exactly when one's actual earnings do represent his average earning capacity, and when not, and, if not, what they amount to; in other words, there is an absence of any precise formula by which those determinations can be made. In such a situation it is necessary to consider the real objective of wage calculation, which is to arrive at a fair approximation of the injured employee's future earning capacity, and not to be influenced by the thought that a compensation theory is necessarily satisfied when a mechanical representation of the claimant's earnings in some arbitrary past

period is used as a wage basis. It must be remembered at all times that an injured workman's disability reaches into the future, and not the past, and that his loss as a result of such disability has an impact only on probable future earnings. See Larson, Workmen's Compensation Law, Vol. 2, page 71, §60.11; *St. Paul-Mercury Indemnity Co. v. Idov,* 88 Ga. 697, 77 SE 2d 327, 329.

With this in mind, it would be reasonable then to give this construction to the statute:

1. Actual earnings at the time of injury should be used as the basis for temporary compensation, where the type of employment engaged in by the workman at the time of injury is of a regular, permanent and steady character.

2. Where the employment is discontinuous or irregular, actual earnings cannot be used; in such case, the average wage earning capacity would have to be determined with consideration given to a history of the employee's earnings in other employment, together with his "capacity", that is, his fitness, willingness and readiness to work, considered in connection with opportunity to work.

Thus, giving proper consideration to the realities of temporary total disability, and the objectives of the law on this subject, it would be perfectly proper and logical to so interpret the temporary disability section of the Alaska statute, and under such construction, particularly under "1", supra, the evidence in this case clearly shows that the Board's figure of $3.88 per day, as appellant's average daily wage earn-

ing capacity, was far below that amount which, in reality, represented his loss of earnings during such period of disability.

Actual earnings at the time of injury would, it would seem, be the only just consideration in a case of this kind. And this is because the record of appellant's work with appellee, Halferty Canneries, Inc., shows beyond dispute that this was employment of a regular, permanent and steady character, such as to justify the application of construction (1), supra, of the Alaska law on temporary disability. The Record shows that for every year since 1926 appellant has worked during the fishing seasons in Alaska for this corporation—as a fisherman from 1926 to 1945, as a net and web man to 1951, and as a net boss for the 1951 and 1952 seasons—a total of 26 years. It is extremely difficult to understand how such employment, in the course of which appellant was injured, could be called anything but permanent and regular. To think of it as anything but a regular and steady type of employment, which will justify disability compensation based upon actual earnings at the time of injury, would be to completely ignore the realities in this case.

Implicit in appellees' computation of the amount of compensation due, which was based upon appellant's average earnings outside of Alaska for the years 1948 to 1951 (R. 4-5), is the argument that regardless of the number of years this man had worked for his employer, and the steadiness and regularity of such employment, the earnings of such employ-

ment could never be used as a basis for temporary compensation because this work is what is termed "seasonal", that is, although it occurs regularly, year after year, it exists each year for a period less than the entire twelve months of such year.

Such an argument is completely unfair and defeats the objectives of workmen's compensation laws. It would mean, if it were consistently applied, that one, like appellant, who was employed each year in Alaska from June to November, would have to have different rates and periods of compensation, depending upon when he was injured and how long his disability lasted. For example, if he ordinarily left his seasonal employment on November 1 of each year, and was disabled from September 1 to December 31, then he would receive compensation based on actual earnings at the time of injury from September 1 to November 1, and compensation based upon some other figure, from November 1 to December 31. Many instances can be conceived where even more complicated determinations would have to be made and confusion multiplied.

Certainly, this could not have been intended by the Legislature when it enacted the statute. It must have been intended that some definite and certain determination could be readily made by which an injured employee would be fairly and justly compensated for his loss of earning capacity for the period that he was disabled. And such confusion and uncertainty can be avoided if, in a case of the kind here, the appellant's earning "capacity" is determined to be that which

appellant, by long years of steady and regular work with the same employer, has exhibited it to be, and that which appellee, by having employed appellant for those long years, has admitted it to be, that is, his actual average earnings at the time of his injury. To hold otherwise would necessitate the utilization of presumptions and unknown factors that would be totally unjustified. Why, for example, must it be presumed in this case that appellant left his employment on September 27, 1952, for any reason other than the injury which occurred in the course of such employment, and that had it not been for such injury, he would have continued to earn his average of $17.63 a day until the end of his period of disability, November 30, 1952; or, why is it to be presumed that even outside of such seasonal employment he would not, except for such injury, have earned considerably more between September 27, 1952, and November 30, 1952, than he had earned as an average between those periods of time in former years, because of factors such as appellant's age, his health, and other needs?

Appellees' entire argument, as in a companion case (*Brown v. Alaska Aggregate, et al.,* No. 14,566) is based upon hypotheses, totally unsupported by facts—a fallacious argument which says that compensation theory is satisfied if a mechanical representation of one's earnings in some arbitrary past period is used as a wage basis. See Larson, Workmen's Compensation Law, Vol. 2, p. 71, §60.11. This is not, it is submitted, what the Alaska statute has contemplated at all. Appellant's employment with Halferty Canneries,

Inc. was as regular, steady and continuous as any employment could be, and because of that, the only fair compensation for his injury and the measure of his earning capacity, would be the wages that he was earning at the time of such injury. Cf. *St. Paul-Mercury Indemnity Co. v. Idov,* 88 Ga. 697, 77 SE 2d 327, 329; *O'Hearne v. Md. Casualty Co.,* CA-4, 177 F. 2d 979.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed.

Dated, Juneau, Alaska,
February 23, 1955.

JOHN H. DIMOND,
ROY E. JACKSON,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

§43-3-1 [*Temporary Disability.*] ACLA 1949

"For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

"Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

"The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition."

§43-3-16 ACLA 1949

"Review by full Board: Application: Time for: Award: Filing: Copies. If an application for review is made to the Industrial Board within ten days from the date of an award, made by less than all the members, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith."